

**BEFORE THE  
DEPARTMENT OF FOOD AND AGRICULTURE  
OF THE STATE OF CALIFORNIA**

In the Matter of the Appeal of:

Sharon, James and Ben Van Foeken  
dba Cottage Grove Fruit  
PO Box 357  
Ivanhoe, CA 93235

Appellant

File No. 1516-CF 002

**DECISION AND ORDER  
ON APPEAL**

**I.  
STATEMENT OF THE CASE**

The California Certified Farmers' Market Program, Section 47000, *et seq.* of the California Food and Agricultural Code, establishes Direct Marketing by directing the Secretary and county agricultural commissioners under the supervision and direction of the Secretary to enforce regulations adopted under Title 3, California Code of Regulations ("3 CCR") Section 1392, *et seq.* Under the requirements of this program, producers are issued certificates in accordance with the requirements of the Direct Marketing Program, commonly known as the Certified Farmers' Market Program. Certificate holders can sell only agricultural commodities that they have produced directly to the public. If a violation occurs, the Secretary or county agricultural commissioner may take any corrective action as specific to this act.

On October 13, 2015, the Los Angeles Agricultural Commissioner/Director of Weights and Measures ("Respondent") formally issued a Notice of Proposed Action, Grounds Therefore, and Opportunity to be Heard ("Notice") to Sharon, James and Ben Van Foeken, dba Cottage Grove Fruit ("Appellant"). The Notice was for one (1) count of violation of California Food and Agricultural Code Section 47002 and 3 CCR Section 1392.4(a), which prohibits certified farmers from selling produce not of their own production. The Respondent sought to recover an administrative penalty in the amount of seven hundred dollars (\$700) and suspend Appellant from participation in any California Certified Farmers' Market ("CFM") for six (6) months for selling produce not of their own production.

Hearing Officer Greg Creekmur conducted a hearing on January 13, 2016, with both parties in attendance. During the pre-hearing conference, the Appellant stipulated that the violation occurred. Hearing Officer Creekmur confirmed the stipulations during the hearing and stated that the hearing would determine appropriateness of the fine and suspension. Hearing Officer Creekmur determined that the proposed penalty of seven hundred dollars (\$700) and suspension from participation in any California Certified Farmers' Market for six (6) months was appropriate for the violation. On February 10, 2016, the Respondent adopted the Hearing Officer's decision as submitted. On March 21, 2016, the Appellant submitted an appeal to the

Secretary of the Department of Food and Agriculture (“Department”) on the basis that the stipulation was only with respect to acknowledging a violation occurred, not an admission that Appellant committed the violation, that the person who committed the violation was not actually Appellant’s employee and was acting on their own accord, and that the suspension is disproportionate and will cause an economic hardship.

## II. STANDARD OF REVIEW

The Department may not consider evidence outside the records, but must consider the entire record, and deny the appeal if there is any substantial evidence to support the findings. (*Smith v. County of Los Angeles* (1989) 211 Cal.App.3<sup>rd</sup> 188, 198-199) Substantial evidence is defined as evidence of “ponderable legal significance” which is “reasonable in nature, credible and of solid value”, distinguishable from the lesser requirement of “any evidence.” (*Newman v. State Personnel Board* (1992) 10 Cal.App.4<sup>th</sup> 41, 47; *Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873) In other words, the Department cannot substitute its judgment for the judgment of the finder of fact if there is enough relevant and reliable information to establish a fair argument in support of the result, even if other results might have also been reached. (*Smith v. County of Los Angeles, supra*; *Bowers v. Bernards, supra*, 10 Cal.App. 4<sup>th</sup> at 873-874)

## III. STATEMENT OF FACTS

Appellant is the owner of Cottage Grove Fruit, which sells various fruit at CFMs. The Appellant also sells vegetables for Jorge Aguilar, Maria Wright-Galve and Osaías Galve (hereinafter “Jorge Aguilar”).

Respondent presented evidence that on July 16, 2016, Inspector Geoff Birch (“Inspector Birch”) and Inspector Danny Estrada (“Inspector Estrada”) inspected the Appellant’s stall at the South Bay Pavilion CFM. Inspector Birch is an Inspector III and has worked for the Respondent in the Produce Safety Pest Exclusion Branch for five years. He testified that he possesses a Commodity Regulation License issued by the State of California. Inspector Estrada is an Inspector and has worked for the Respondent in the Produce Safety Pest Exclusion Branch for over one year. He testified that he possesses a Commodity Regulation License issued by the State of California.

During the July 16, 2015 inspection of Appellant’s stall, Inspector Birch testified that Wilfredo Esquivel and Roxanna Villamarin presented a Tulare Certified Producer’s Certificate (“CPC”) #54-00192 belonging to Appellant (Exhibit H), and Fresno County CPC #15 1277, belonging to Jorge Aguilar (Exhibit E). The inspectors noted that the certificates were properly cross-referenced, allowing Appellant to sell produce on behalf of Jorge Aguilar.

Inspector Birch testified that he observed 15-20 white potatoes for sale (Exhibit G). Roxane Villamarin told inspectors that the potatoes were being sold under Aguilar’s certificate. Inspector Birch checked the CPC and saw that only red and stored sweet potatoes were listed. Inspectors Birch and Estrada issued Notice of Noncompliance #597193 to Jorge Aguilar. Respondent also produced evidence that Wilfredo Esquivel and Roxanna Villamarin were Appellant’s employees (Exhibit F).

Respondent presented evidence that the violation was determined as serious based on 3 CCR Section 1392.4.1(c). The fine and suspension from participation in CFMs was determined based on a prior violation on April 16, 2015, also at the South Bay Pavilion CFM, where Appellant's employees, Wilfredo Esquivel and Roxanna Villamarin, were selling green beans and tomatoes outside the harvest season (Exhibit O). Respondent stated that because of this previous violation, the fine and suspension are intended to be punitive to correct behavior.

On July 20, 2015, Inspector Ibrahim Abdel-Fatah ("Inspector Abdel-Fatah") called Jorge Aguilar to ask him if Roxanna Villamarin was his employee. Inspector Abdel-Fatah is an Inspector III and has worked for the Respondent for 17 years, currently with the Produce Safety Pest Exclusion Branch. He testified that he possesses a Commodity Regulation License issued by the State of California. Inspector Abdel-Fatah testified that Jorge Aguilar responded that Roxanna Villamarin was employed by Van Foeken. He also confirmed to Inspector Abdel-Fatah that he did not produce white potatoes. On October 8, 2015, Notice of Noncompliance #597633 was issued to the Appellant (Exhibit I).

Dale Whitney, witness for the Appellant, is market manager for the Harbor Area CFM. Mr. Whitney testified that Appellant sells primarily produce and sells at the CFM year round. He also testified that Appellant may lose seniority at the CFM and space may not be available upon return, should Appellant be suspended from participation.

Jim Van Foeken testified that he has farmed since 1978 and has participated in farmers' markets for over thirty years. Mr. Van Foeken testified that he participates in nine CFMs and testified that he does not provide direct supervision over his stalls at the CFMs; his employees run the stalls independently. Mr. Van Foeken testified that when the violation occurred, Roxanna Villamarin was his employee. Appellant also presented evidence of the financial impact a six-month suspension would have on the business and its employees.

#### **IV. DETERMINATION OF ISSUES**

The Appellant has appealed the Respondent's decision to suspend its privileges to participate in the CFM and to impose a civil penalty pursuant to Food and Agricultural Code Section 47025(d). The evidence supports a finding that the Appellant violated 3 CCR Section 1392.4, which is a serious violation under Food and Agricultural Code Section 47025(c).

Appellant presented additional arguments that the stipulation made at the hearing was solely with respect to Roxanna Villamarin selling potatoes at the South Bay CFM and not an admission of Appellant's guilt in committing the violation. The recording of the hearing demonstrates that Appellant was not contesting the violation and accepted that it was committed by their employee, Roxanna Villamarin.

Even accepting that Appellant did not stipulate to committing the violation, Respondent's and Appellant's own admissions prove otherwise. By Appellant's own admission, Roxanna Villamarin was Appellant's employee. Appellant's claims that Roxanna Villamarin was not an employee and not authorized to sell at the South Bay CFM are not credible. Roxanna Villamarin's declaration is contradictory, on the one hand stating she is not an employee and on the other hand stating that if Appellant's license is suspended, Appellant will terminate her. While Appellant alleges that Roxanna Villamarin's employee agreement was forged, Appellant

was aware that she was selling produce for the Appellant, as evidenced by the previous violation. The overwhelming evidence supports that Roxanna Villamarin was Appellant's employee when the violation occurred. Appellant is responsible for ensuring their employees comply with CFM statutes and regulations.

Lastly, Appellant presented evidence of a previous instance where three serious violations of a different producer only resulted in a one-month suspension, whereas Appellant only has one prior violation and Respondent proposed a six-month suspension. One previous instance is not determinative, and the facts in that case were not presented during the hearing. Also, evidence submitted regarding the previous case with a one-month suspension is outside the scope of review on appeal. Appellant also reiterated the financial hardship that would result from the suspension raised during the hearing, but this is not a factor that can be considered when determining the penalty. The evidence demonstrates that the civil penalty of seven hundred dollars (\$700) and suspension from participation in any CFM in California for six (6) months are appropriate.

###

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**V.  
DECISION**

Considering all of the evidence in the record, the Department finds to deny Sharon, James and Ben Van Foeken's appeal of the Decision and Order of the Los Angeles County Agricultural Commissioner/Director of Weights and Measures. Appellant is ordered to pay a fine of seven hundred dollars (\$700) for one count of violation of 3 CCR Section 1392.4(a) and is suspended for six (6) months from participation in any California Certified Farmers' Market.

This Decision and Order shall be effective July 5, 2016.

IT IS SO ORDERED this 2 day of JUNE, 2016.



CRYSTAL D'SOUZA

Staff Counsel

California Department of Food and Agriculture

**APPELLANT'S RIGHT TO SEEK JUDICIAL REVIEW**

Judicial review of the decision of the Department may be sought within thirty (30) days of the effective date of this decision pursuant to Section 1094.5 of the California Code of Civil Procedure.